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IN THE

# Supreme Court of the United States

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

*Appellants/Objecting Members of Defendant Class,*

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

*Appellees/Plaintiffs,*

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

*Defendants (Appellees).*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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*Defendants (Appellees).*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

## ARGUMENT

**Absent members of a defendant class, against whom a final order of a three judge district court imposes individual injunctive relief, having appeared and objected upon notification of the fairness hearing on a consent decree proposed by named parties after constitutional determination on the merits by the Court, are parties entitled to maintain a direct appeal of such constitutional determination to the United States Supreme Court pursuant to 28 U.S.C. §1253.**

This is a dual class action insisted upon by plaintiffs and imposed upon defendants under Fed. R. Civ. Pro. 23(b)(2). Plaintiff-employees sought and obtained individual declaratory and injunctive relief against each and every one of some nine hundred insurance companies and self-insured employer members of defendant class, proscribing the use of a supersedeas procedure set forth in §413(a) of the Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1984), with liability for apportioned share of plaintiffs' attorney's fee.

Having secured this result, after urging that there was a violation of procedural due process under the Fourteenth Amendment to the United States Constitution by reason of an interim suspension of workmen's compensation benefits without prior notice and opportunity to be heard, plaintiffs-appellees now vigorously maintain that the appellants, as absent defendant class members who were not furnished formal notice of the proceedings, prior to the scheduling of the fairness hearing, shall have no opportunity themselves to be heard on the constitutional issue resolved against them.

Appellants did appear, object and argue at the fairness hearing on the proposed consent decree entered into by the named parties after the decision by the lower court. In addition appellants did specifically note preservation of the right to object to the entire constitutional determination. (Apdx. 136a, 138a, 144a, 147a). Following the court's final order, granting both declaratory and injunctive relief against each defendant class member, appellants initially filed a protective appeal to the Court of Appeals for the Third Circuit (Apdx. 84a), and then a direct appeal to this Court (Apdx. 87a), both within the required time.

As parties aggrieved by a final order of a three judge court granting injunctive relief, appellants have an evident statutory right to direct appeal to this Court under 28 U.S.C. §1253. There is no law or logic to the contrary. The cases cited by appellees are inapposite, nor do they suggest any rational theory that would recommend the position they advance.

In *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the district court *denied* a motion to enter a consent decree proposed by plaintiff class and the named defendants. Plaintiffs appealed to the circuit court where the appeal was dismissed for want of jurisdiction. This Court granted certiorari and held that the district court's refusal to approve the consent decree had the practical effect of refusing an injunction, which, with the additional determination of irreparable consequences, constituted an exception to the "final judgment rule," permitting appeal that should have been entertained by the circuit court under 28 U.S.C. §1292(a)(1). *Id.* at 84-85.

The further language quoted in *Carson*, at 86, from *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971),

relied upon by appellees, does not apply in context here. In *Armour*, it was stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. . . . Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

*Id.* at 681-682. Such comment by the Court not only fails to support appellees' contention, but indeed lends inferential weight to, if not specific authority for, appellants' position as *objecting* members of defendant class, with regard to the processing of the instant appeal, since they did *not* negotiate, agree, consent or "waive their right to litigate."

In *Armour*, the government was seeking to include a subsequently-acquired company within the prohibitory terms of the previous consent decree. This Court found such effort to be unsupported by the precise terms of the consent decree, and it was in such context that the quoted statement was made about decrees entered by agreement having constituted a waiver of the consenting parties' right to litigate the issues. In fact, then, *Armour* does not contradict appellants' right, as objecting members of the defendant class, to litigate the issues resolved against them.

While opinions typified by *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956 (3d Cir. 1983), may fairly be said to support a general, if not axiomatic, proposition that courts favor settlement of complex litigation, the merit of such consummation rather obviously was not compelling here. Similarly, the appellees' basic assertion that "[t]he very reason why litigants enter into settlements, by Consent Decree or otherwise, is to avoid a judicial determination of the merits of the underlying controversy," *Motion to Dismiss* at 10, is singularly inappropriate and strikingly inapplicable. This case was *not* "settled"; instead, it was litigated for eight years, following which the court—not the parties—made that very "judicial determination of the merits of the underlying controversy." *Id.*

In a fifty page majority and concurring opinion, the lower court decided that the interim suspension procedure in §413(a) of the Pennsylvania Workmen's Compensation Act violates the due process clause of the Fourteenth Amendment to the United States Constitution. It was the declaratory and injunctive implementation of that constitutional determination against defendant class members that was then agreed to by the named parties. Comments in cases reviewing, not a judgment, but rather the propriety of a monetary settlement to a plaintiff class are not controlling and are hardly relevant here. *Accord, Airline Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980), *rev'd sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982), where this Court rejected a supposed jurisdictional prerequisite, and actually *reversed* the circuit court decision which had denied an intervenor's appeal after a class action settlement providing monetary and seniority relief. The

earlier comment by the circuit court about the "virtue which may reside in a compromise" had been made in the context of "avoidance of wasteful litigation and expense" by effecting a settlement in lieu of pursuing a decision on the merits. 630 F.2d at 1167. Here, however, after eight years of litigation, a decision on the merits *was* rendered by the lower court. In any event, in *Zipes* this Court did in fact entertain the appeal to the extent of ruling on the jurisdictional question. Thus if the case has any application here it is supportive of, and not contra to, the instant appeal.

In those cases where the "fair, reasonable, and adequate" standard for a consent decree is stated, it was in fact the fairness, reasonableness, and/or adequacy of the consent decree that had been put in issue, but none of the cases cited and/or relied upon by appellees actually support their contention that these appellants are precluded from raising on appeal the merits of the underlying controversy. Significantly, in *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980), though cited by appellees, is found an authoritative statement on the very issue they raise, specifically supporting the appeal filed by these appellants:

> An unnamed class member who appears in response to a Rule 23(e) notice and objects to a settlement has a right to appeal from an adverse judgment.

*Id.* at 327. So too said the court in *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970); *see also* 3B Moore's Federal Practice ¶23:80[5] (1982 and Supp. 1984).

In the case at bar, it was only at the time of the scheduled fairness hearing on the consent decree to implement the court's decision on the merits that Rule 23(e) notice of the proceedings was finally given to non-named class members, with instructions as to method and means of objection. Appellants duly appeared, objected and argued, noting their intent to preserve their right to question the entire constitutional determination. It seems anomalous, if not incredible, in a case predicated upon a supposed deprivation of due process to an *employee* class complaining about absence of prior notice and opportunity to be heard, for those employees to argue now that non-named members of *employer* class, though they objected at first notice of the proceedings, nevertheless shall have no opportunity to be heard on the merits of a final constitutional determination that visits both declaratory and injunctive prohibition upon each one of them.

Such could hardly be a reasonable or required result. Surely objecting employers and insurance carriers, as members of the designated defendant class, must be due and afforded "process" that includes a meaningful opportunity to be heard on the merits by timely appeal. That seems implicit in this Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), where a *putative* member of a class that had been *denied* designation was permitted to intervene for purposes of appealing that issue, following an agreed-upon award.

Appellees concede that appeal by these appellants did lie on "whether the district court abused its discretion, or misapplied governing legal precepts, in approving the Consent Decree." *Motion* at 9. If so, then some form of appellate review was to be had, and there would be no logic whatever to suggest that in the case at bar, review should vacuously consider only some element of fairness

of the remedy. This is not a case involving one issue on the merits and a separate issue on damages, where parties might accept an adverse result, but seek to question some compromised award for or against them. Here, the declaratory and injunctive relief proscribing the use of the supersedeas procedure actually flows as a direct continuation of and from the determination of unconstitutional conduct. To question fairness of the remedy would, by indirection, necessarily put in question the constitutional basis for relief, and that is exactly what these appellants seek to do directly in this appeal.

Moreover, any multiplicity of litigation that class actions are thought or intended to avoid should be recognized as horizontal in nature, to preclude collateral duplication. But most assuredly and particularly class action "theory" should support, if not insist upon, vertical completion of the litigation, to include thorough and unrestricted appellate review by class members affected adversely by the class determination. Opportunity for such inclusive appellate review within the required time does not prolong the litigation in chief beyond what would be required if a named party were to appeal, and serves to assure the basic and essential due process fairness to be accorded to all class members—named and absent—before any class result is imposed inexorably upon each and all of them.

There is no case law cited that precludes these appellants from review of the lower court's constitutional determination on the merits. All relevant statements, comments and inferences, together with the weight of common sense, logic and, indeed, due process itself, urge, if they do not dictate, to the contrary. Appellants therefore pray this Honorable Court to permit the pending appeal on substantial constitutional issues to proceed.



## Conclusion

For the reasons stated, this Court should note probable jurisdiction, deny appellees' Motion to Dismiss or Affirm, and permit the instant appeal to be heard on the constitutional merits.

Respectfully submitted,

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